BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JERRY LANE	)	
Claimant	)	
VS.	)	
	)	Docket No. 259,912
SEALY CORPORATION	)	
Respondent	)	
AND	)	
	)	
CONTINENTAL NATIONAL AMERICAN GROUP	)	
Insurance Carrier	)	

ORDER

Respondent appeals the May 20, 2002 Award of Administrative Law Judge Steven J. Howard. Claimant was awarded a 47.5 percent permanent partial general disability for the injuries suffered to his back on July 5, 2000. Respondent contends claimant's permanent partial disability compensation award should be limited to his percentage of functional impairment, as accommodated work was available to claimant with respondent. Respondent argues claimant simply failed to utilize the bid process available to claimant in his post-injury job search. The Appeals Board (Board) held oral argument on December 4, 2002.

APPEARANCES

Claimant appeared by his attorney, Dennis L. Horner of Kansas City, Kansas. Respondent and its insurance carrier appeared by their attorney, Matthew S. Weaver of Overland Park, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

(1) Is claimant entitled to the statutory unauthorized medical allowance?

(2) What is the nature and extent of claimant's disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board makes the following findings of fact and conclusions of law:

Claimant, an employee of respondent since July of 1997, was a foundation upholsterer in the summer of 2000. On July 5, 2000, while working, claimant suffered an injury to his low back. He was referred to the industrial clinic for an examination and later referred to Dickson-Dively Orthopedic Clinic. He ultimately came under the treatment of board certified orthopedic surgeon Jeffrey MacMillan, M.D. Dr. MacMillan first examined claimant in November of 2000, diagnosing a disc herniation at L5-S1. Claimant had complaints of pain and numbness down his left lower extremity. Dr. MacMillan recommended, and claimant agreed to, a laminotomy and discectomy at the L5-S1 level, which was performed on November 15, 2000. Dr. MacMillan continued treating claimant until May 1, 2001, when he released him at maximum medical improvement, finding claimant had suffered a 10 percent impairment to the body as a whole pursuant the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*.

After being released with restrictions of no repetitive or extended periods of bending, stooping, heavy lifting or carrying, claimant attempted to contact respondent regarding a possible return to work. Claimant testified he contacted Lisa in Human Resources, but she was unable to provide him with any information. She did say she would get back to him.

Claimant's uncontradicted testimony is that he contacted respondent no less than five times, with three of those contacts being to Lisa and two being to an answering machine. At no time did any representative of respondent ever return claimant's calls.

Prior to his injury, claimant had been a shop steward for respondent for between six months and a year. He was aware of the bid process available at respondent's plant. He was not, however, sure whether he was allowed back on the property in order to submit bids and, therefore, never returned to respondent's property.

Clamant testified that he was not sure of his position with respondent. He did not think he was allowed back on respondent's property without specific permission, but no one from respondent ever contacted him to advise him to the contrary.

Respondent criticized claimant's lack of effort in failing to bid, as there were several jobs available for bid which allegedly would have been within claimant's restrictions from Dr. MacMillan and which would have paid claimant a comparable wage. Respondent argues claimant should be limited to his functional impairment due to his failure to bid on those jobs.

In July of 2001, claimant applied for and began receiving unemployment compensation from the state of Kansas. Claimant also began performing a job search, obtaining a job with Labor Pros in January of 2002. This was a part-time job and was obtained a few weeks after claimant's unemployment benefits ran out. At the time of the April 12, 2002 continuation of the regular hearing, claimant was working part time for Amazing Tree Service (Amazing). Claimant testified that some of the duties at Amazing exceeded his restrictions and he was unable to do some of the "bigger stuff," like when they worked with tree stumps. He was, however, able to perform the lighter duties, including using a rake, picking up and dragging limbs, and using a chain saw. Claimant testified the chain saw weighed between 7 and 15 pounds. He worked with Amazing approximately three days a week, earning $7 per hour for 20 to 30 hours per week. There was no indication that claimant was seeking full-time employment at the time of his testimony.

Respondent contracted with a private investigator to conduct surveillance on claimant. On February 27, 2002, the investigator, Daniel Kreitman, videotaped claimant working for Amazing. The videotape shows claimant performing numerous activities, including moving limbs, trimming trees and handling chain saws.

Claimant was referred to vocational experts Richard Santner and Michael Dreiling. The report from Mr. Santner, including the tasks from claimant's employment over the fifteen years preceding his accident, was provided to Dr. MacMillan. As a result of his last examination, Dr. MacMillan provided an opinion regarding the limitations claimant would have. However, when Dr. MacMillan viewed the videotape, he changed some of his restrictions. His restrictions, which had included no repetitive bending or stooping and prohibitions against heavy lifting and carrying, were modified to continue the heavy lifting and carrying restrictions, but eliminate the repetitive bending and stooping portions of the restrictions. After viewing the videotape, Dr. MacMillan opined that claimant was able to perform sixteen of the seventeen tasks on Mr. Santner's list, for a task loss of 6 percent.

Claimant was referred to board certified orthopedic surgeon Truett L. Swaim, M.D., at his attorney's request, for an examination on September 27, 2001. Dr. Swaim

diagnosed post lumbar laminotomy discectomy at the L5-S1 level, with ongoing symptoms and signs compatible with left leg radiculopathy. He assessed claimant a 20 percent whole body impairment using the DRE Model of the AMA *Guides* (4th ed.). The parties have stipulated to a 15 percent whole person impairment, which appears to be an average of Dr. MacMillan's and Dr. Swaim's ratings

Dr. Swaim was provided a task list provided by Michael Dreiling, which identified thirteen separate job tasks. Dr. Swaim testified that claimant was incapable of performing eight of the thirteen tasks, for a 62 percent task loss. The video of claimant performing the job tasks with Amazing was taped on February 27, 2002. Dr. Swaim's deposition was taken several days before, on February 19, 2002. Therefore, Dr. Swaim obviously was not aware of claimant's physical activities as displayed on the videotape.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[1]

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.[2]

In determining the nature and extent of claimant's disability, the Board must first consider respondent's contention that claimant has violated the principle set forth in *Foulk.*[3] In *Foulk*, the Kansas Court of Appeals held that the Workers Compensation Act should not be construed to award benefits to a worker solely for refusing a proffered job that the worker has the ability to perform. In this instance, respondent argues that claimant should have utilized the bid process. Respondent contends that had claimant utilized this bid process, he would have been awarded a job with respondent which would have paid

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[1] K.S.A. 44-501 and K.S.A. 44-508(g).

[2] K.S.A. 44-510e.

[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

a comparable wage, therefore limiting claimant, under K.S.A. 44-510e, to a permanent partial disability based on his percentage of functional impairment. Claimant's uncontradicted testimony is that he contacted respondent no less than five times. Three times he talked to respondent's representative, Lisa, in the Human Resources Department, and twice he left messages on respondent's answering machine. At no time did respondent return claimant's calls. Uncontradicted evidence which is not improbable or unreasonable may not be disregarded unless it is shown to be untrustworthy.[4]

The Board finds that claimant did not violate the principle set forth in *Foulk*, as claimant contacted respondent five times. But rather it was respondent's representatives who failed to return claimant's calls. While the Act does not impose an affirmative duty upon the employer to offer accommodated work,[5] respondent did not show good faith by ignoring claimant's attempts at reemployment. The Board, therefore, finds that claimant did not refuse an offer of accommodated employment and is not in violation of the policy set forth in *Foulk*.

The Board must next consider whether claimant put forth a good faith effort to obtain employment after leaving respondent's job. The Kansas Court of Appeals, in *Copeland,*[6] held that if a claimant, post injury, does not put forth a good faith effort to obtain employment, then the trier of fact is obligated to impute a wage based upon claimant's wage-earning ability. Here, claimant obtained part-time employment after leaving respondent. However, there is no medical evidence in the record to indicate claimant is, in any way, limited to part-time employment. There is also no indication that claimant continues to look for full-time employment while working 20 to 30 hours per week for Amazing. Claimant's efforts in this regard are inadequate. The Board finds that claimant is in violation of the policies set forth in *Copeland*, and the Board will impute a post-injury wage based upon the evidence in the record.

The Administrative Law Judge found that based upon the opinions of Mr. Dreiling and Mr. Santner, claimant was capable of earning $9 per hour, working a 40-hour week. The Board agrees. This results in an imputed wage of $360 per week which, when compared to claimant's average weekly wage of $927.83, creates a 61 percent wage loss. The Board affirms that finding.

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[4] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

[5] *Griffin v. Dodge City Cooperative Exchange*, 23 Kan. App. 2d 139, 927 P.2d 958 (1996), *rev. denied* 261 Kan. 1084 (1997).

[6] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

The Board must next consider, under K.S.A. 44-510e, what, if any, task loss claimant suffered as a result of his injuries with respondent. Both Dr. Swaim and Dr. MacMillan provided task loss opinions considering the task lists created by vocational experts Richard Santner and Michael Dreiling. However, Dr. MacMillan was the only doctor who was provided the videotape of claimant working for Amazing. When shown this tape, Dr. MacMillan testified that his opinion regarding claimant's restrictions had changed. The physical activities displayed in the videotape exceeded those which claimant had displayed during Dr. MacMillan's examination and treatment. Dr. MacMillan felt that, as a result of reviewing the videotape, the repetitive bending and stooping portions of the restrictions originally given claimant should be eliminated. The Board finds the opinion of Dr. MacMillan to be the most credible regarding claimant's task loss. The Board, therefore, modifies the Award of the Administrative Law Judge, finding claimant has suffered a task loss of 6 percent. In averaging the 61 percent wage loss with the 6 percent task loss, the Board finds claimant has suffered a 33.5 percent permanent partial general disability as a result of the injuries suffered with respondent on July 5, 2000.

The Board further finds claimant is entitled to unauthorized medical expenses up to the statutory maximum, which have not been utilized as of the date of this decision, upon presentation of an itemized statement verifying same.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Steven J. Howard dated May 20, 2002, should be, and is hereby, modified, and an award is granted in favor of the claimant, Jerry Lane, and against the respondent, Sealy Corporation, and its insurance carrier, Continental National American Group, for an injury occurring on July 5, 2000, for a 33.5 percent permanent partial general disability. Claimant is entitled to 41.14 weeks of temporary total disability compensation at the rate of $401 per week totaling $16,497.14, followed by 130.27 weeks of permanent partial disability compensation at the rate of $401 per week in the amount of $52,238.27, for a total award of $68,735.41.

As of January 29, 2003, there would be due and owing to claimant 41.14 weeks of temporary total disability compensation at the rate of $401 per week in the sum of $16,497.14, followed by 92.86 weeks of permanent partial disability compensation at the rate of $401 per week in the sum of $37,236.86, for a total due and owing of $53,734 which is ordered paid in one lump sum minus any amounts previously paid. Thereafter,

the balance in the amount of $15,001.41 shall be paid at the rate of $401 per week for 37.41 weeks until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of March 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully disagree with the majority's decision as I would affirm the Award. Based upon the nature of claimant's injury and the resulting back surgery, I believe claimant has sustained more than a six percent task loss. Accordingly, I believe the Judge correctly averaged Dr. MacMillan's six percent task loss with Dr. Swaim's 62 percent task loss, which created a 34 percent task loss for the permanent partial general disability formula.

I agree with Judge Howard that claimant has sustained a 47.5 percent work disability.

BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Matthew S. Weaver, Attorney for Respondent
Steven J. Howard, Administrative Law Judge
Director, Division of Workers Compensation